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**IN THE
COURT OF APPEALS OF INDIANA**

OLD PATHS BAPTIST CHURCH,
an Unincorporated Association, and
JOHN T. LEWIS,

Appellants-Plaintiffs,

VS.

DAN YOUNG, DUANE CLEGHORN,
BERT ENGLER, MELISSA LOWE,
NORA SHEPHERD, and PHYLLIS
CALVERT,

Appellees-Respondents.

[illegible]

No. 88A01-0504-CV-177

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Roger D. Davis, Special Judge
Cause No. 88C01-9906-CP-123

October 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Old Paths Baptist Church, an independent unregistered church in Campbellsburg, Indiana (“Old Paths”), appeals from the trial court’s judgment against it in its action against various individuals regarding a dispute over ownership of land. In addition, John Lewis, pastor of Old Paths, appeals from the trial court’s judgment against him on Nora Shepherd’s counterclaims against him. Old Paths and Lewis raise the following issues for our review:

1. Whether the trial court properly concluded that an oral contract existed regarding the purchase and ownership of the land and that the Statute of Frauds did not apply because of part performance;
2. Whether the trial court properly ordered the equitable relief of specific performance and imposition of a constructive trust;
3. Whether Findings 68, 70, and 71 are supported by the evidence.

In addition, Lewis raises the following issues:

4. Whether Lewis was deprived of due process by the manner in which Nora’s counterclaims against him were served; and
5. Whether the trial court properly ordered Lewis to pay Nora’s attorney fees.¹

Concluding that the findings and evidence support the trial court’s judgment and that the trial court did not err in any of the particulars alleged by Old Paths and Lewis, we affirm the judgment of the trial court.

Facts and Procedural History

Tom and Nora Shepherd moved to Indiana from Tennessee in 1996 at Lewis’s

¹ Lewis actually lists eight issues in his Statement of Issues. See Appellant’s Brief of John T. Lewis at 1. However, several of those issues are identical to those raised by Old Paths and will be discussed in that context. The remainder of the issues Lewis purports to raise are not supported by cogent reasoning or citation to legal authorities and we therefore decline to address them.

invitation. Prior to August 1997, the Shepherds operated a children's home ministry called Faith Ranch on land owned by Eric Wheeler. Correspondence from Faith Ranch indicated it was a "ministry of Old Paths." See Plaintiff's Exhibit 9 at page 2; Plaintiff's Exhibit 10. Faith Ranch made improvements upon Wheeler's land in lieu of paying rent for use of the property. In August 1997, Tom died, and soon thereafter, Eric Wheeler informed Nora that she had to move from his property. Lewis encouraged Nora to sue Wheeler, in part to delay the move and allow Nora to find new property on which to locate Faith Ranch. Wheeler responded by filing a counterclaim. In September 1997, Nora received \$50,000 in life insurance proceeds because of Tom's death.

In March 1998, Nora, Lewis, and Bob Patenaude, who attended Old Paths, decided to purchase approximately fifty-two acres in Washington County, Indiana, from Alma June O'Connor. They agreed that they would pay \$1,000 per acre. Nora contributed approximately \$25,000, Patenaude approximately \$3,000, and Lewis the remainder.² Although there was never a written agreement, Nora testified that it was her intent and understanding that she, Lewis, and Patenaude would all receive deeds in their individual names for their respective shares of the property. However, because of the pending Wheeler lawsuit, potential State interference with the children's home, and county subdivision laws, Nora accepted Lewis's decision that the entire property should initially be titled in the name of Old Paths and divided into individually-titled parcels later. To complete the purchase, Lewis directed Nora to take her cash to the realtor on three separate occasions in installments

² O'Connor's property was fifty-six acres in total, but Mary Taylor purchased four acres on which a house was situated and received a deed for that parcel. Taylor is not a party to this litigation.

of less than \$10,000 and ask for receipts in the name of Old Paths. At Lewis's request, on May 6, 1998, a deed was prepared and delivered in the name of Old Paths.

In the summer of 1998, construction began on the building that would house Nora and Faith Ranch. Members of Old Paths and of other unregistered Baptist churches helped with construction. Nora purchased some materials and others were donated. By winter, the building was complete enough for Nora and the children to reside there. In addition, Nora invited the congregation of Old Paths to meet in the building during the winter months.

In May 1999, Nora resigned from the ministry, stating her intention to sell her land and move to Louisiana to care for her mother. Nora approached Lewis about obtaining a deed to what she believed to be her portion of the property, and offered Old Paths the first option to purchase the land for \$65,000. In the event Old Paths declined to purchase the land and Nora sold it on the open market, she agreed to first swap some of her pasture land for the sink hole ground on Lewis's portion of the property. At a church service on May 12, 1999, Nora told the church of her and Lewis's agreement. Lewis stated that the church would pray about the offer to buy the property. In June 1999, the church offered Nora \$37,000 to "fully reimburse" her for her contributions toward the purchase price of the land and construction of the building. Lewis Exhibit 5. Repeated attempts by Nora to obtain a deed from Lewis proved fruitless.

Duane Cleghorn, Dan Young, and Bert Engler, members of Old Paths who believed Lewis was taking advantage of Nora, sought legal advice on how to protect Nora's interests. On June 3, 1999, they filed papers incorporating Old Paths as Old Paths Baptist Church, Inc., a not-for-profit corporation. The corporation then executed a Corporate Warranty Deed

transferring the entire fifty-two acres from the corporation to Melissa Lowe, Nora's adopted daughter.³ Melissa then sent a note to Lewis informing him that the church could no longer meet in the Faith Ranch building. Cleghorn, Young, and Engler intended to have the land surveyed and deeds drawn up for each of the three purchasers. Because of this litigation, the survey was never completed.

On June 21, 1999, Old Paths filed an Action for Ejectment against Nora, Melissa, and Phyllis Calvert.⁴ Old Paths also filed on that date an Action for Recovery of Possession of Property and to Quiet Title against Cleghorn, Young, Engler, and Lowe; and a Petition for Injunctive Relief and Complaint for Fraud against Cleghorn, Young, and Engler. The petition was later amended to allege conversion, forgery, and theft. Old Paths also filed a Complaint for Conversion against the corporation.⁵

Nora filed a counterclaim against Lewis for specific performance, alleging that, by threats, intimidation, coercion, and undue influence, he caused the purchase agreement and warranty deed to be issued to Old Paths instead of to Lewis, Nora, and Patenaude. The counterclaim was later amended to add additional counts alleging that Nora was entitled to an equitable mortgage and requesting that Lewis be declared a constructive trustee of certain

³ It appears that Nora never officially adopted Melissa through legal proceedings. Nonetheless, she considers Melissa to be her daughter and intends for her property to pass to Melissa upon her death.

⁴ Phyllis Calvert lived on the Faith Ranch property and helped Nora with the children's ministry.

⁵ Old Paths also filed a small claims action against Cleghorn, Young, Nora, Melissa, Phyllis, Kirk Park, Martin Engineering Services, and Jerry Martin for allegedly trespassing on and damaging the land in question when trying to conduct a survey. The small claims action was consolidated with the other pending actions. Jerry Martin and Martin Engineering Services were dismissed as defendants prior to trial, and the claim was dismissed altogether during the trial. See Joint Appendix of the Appellants at 409. In addition, it appears various protective orders were sought and granted in separate proceedings while this litigation was pending.

funds and silver bars that had been entrusted to him by Nora; and was amended later still to add counts alleging that Lewis had converted Nora's property by failing to return silver bars and coins entrusted to him and had breached fiduciary duties to Nora under a Power of Attorney. The defendants also sought and were granted permission to add Lewis as a necessary party to the action. All actions were consolidated into one for trial.

Prior to trial, Old Paths filed a motion for partial summary judgment, requesting that the trial court determine as a matter of law that it owns the real estate in question, quiet title in the real estate, and eject the defendants from the property. The trial court granted the motion in part, finding that the purported conveyance from the corporation to Melissa by corporate warranty deed was invalid, and denied the request to quiet title and to eject the defendants from the property, finding there was a genuine issue of material fact as to whether Old Paths is the rightful owner of the real estate. Old Paths appealed to this court, which held that the trial court did not err in denying Old Paths's motion for partial summary judgment. Old Paths Baptist Church v. Young, No. 88A05-0107-CV-289, slip op. at 10-11 (Ind. Ct. App., Feb. 12, 2002).

Trial commenced on September 22, 2003, and was originally scheduled to last for five days. Instead, it continued for nineteen days thereafter over a nearly one-year period, finally concluding on September 16, 2004. Old Paths was represented by Dale Arnett, Lewis represented himself, and John Mead represented the corporation and the individual defendants. Given the length of the trial and the extended period of time over which it was held, the contentious relationship between the parties, and the oftentimes repetitious or irrelevant testimony elicited by Lewis and counsel from numerous witnesses, Special Judge

Roger Davis entered remarkably lucid and thorough findings and conclusions in reaching the following judgment:

1. Shepherd is entitled to specific performance of her contract.
2. Shepherd shall receive a Deed to that portion of the O'Connor farm, which she purchased, namely the land described in paragraph 68 of the Court's General Findings and Conclusions, together with the easement described in paragraph 73.
3. Lewis is individually the owner of the real estate specifically described in paragraph 71.
4. Robert Patenaude, in his individual capacity, is the owner of the real estate described in paragraph 70.
5. Shepherd shall have a permanent easement which shall be a covenant running with the land over and along the existing roadway from the county road to Shepherd's land. The easement shall be Forty (40) feet in width.
6. Shepherd shall have and recover judgment against Lewis in the sum of Three Hundred Dollars (\$300) for her silver (actual damages).
7. Lewis, having converted the silver, Shepherd shall also have judgment against Lewis for three times her actual damages (\$900.00) plus attorney's fees. The Court finds that reasonable attorneys [sic] fee with respect to the silver, is Three Hundred Dollars (\$300). The total judgment concerning the silver is \$1,500.00 consisting of \$300.00 for actual damages, \$900.00 for treble damages, and \$300.00 for attorneys [sic] fees.
8. Shepherd shall have and recover judgment against Lewis for her attorney's fees.
9. The attorney's fees and expenses are fair, just and reasonable and therefore judgment is entered in the sum of Forty One Thousand Nine Hundred Ninety Six Dollars, Fifty Cents (\$41,996.50) plus expenses of One Thousand Eight Hundred Thirty Eight Dollars, Ninety Eight Cents (\$1,838.98) against Lewis. The Court recognizes that additional legal services have been provided to Shepherd by her counsel subsequent to the period of time covered by defendant's exhibit UU. Once the remainder of the Court's judgment is carried out, Shepherd's counsel may file a petition with the Court for consideration of the approval of additional attorney's fees. Judgment is now granted against Lewis in favor of Shepherd for attorneys fees in the amount of \$41,996.50 and expenses of \$1,838.98.
10. John W. Mead is appointed commissioner of this Court for the purpose of executing a Deed from Old Paths Baptist Church, an

unincorporated association, to Nora Shepherd, to carry out the judgment of this Court.

11. Lewis is legally entitled to enter upon the land of Shepherd for the sole purpose of removing fence posts and wire constructed entirely within the boundaries of Shepherd's property during a ninety day time period beginning with the date of this Judgment.
12. Shepherd shall have a right to hire a surveyor and the surveyor shall have a right to enter upon the land of Lewis, if necessary, to complete a survey of Shepherd's land and easement at any time within two years of the date of this Judgment.

Joint App. at 640-42. Old Paths and Lewis now appeal. Additional facts will be provided as necessary.

Discussion and Decision

I. Standard of Review

The trial court entered findings of fact and conclusions thereon pursuant to Trial Rule 52. Although the trial court mentioned at the close of the trial that "you all said something about proposed findings and conclusions," transcript at 3814, we can find nothing in the record to indicate that any party filed a written request for the entry of findings and conclusions.⁶ We will therefore proceed to review the trial court's findings and conclusions as if they were entered *sua sponte*.

On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Ind. Trial Rule 52(A). Findings are clearly erroneous only when the record contains no facts

⁶ Although the Appellees cite a case in their brief standing for the proposition that "[w]here a Trial Court has made special findings, pursuant to a party's request, under Ind. Trial Rule 52(A), the reviewing Court may affirm the judgment on any legal theory supported by the findings," Appellees' Consolidated Brief at 16 (citing Mitchell v. Mitchell, 695 N.E.2d 920, 923-24 (Ind. 1998)), none of the parties' briefs indicate that such a request was made.

to support them either directly or by inference. Family Video Movie Club, Inc. v. Home Folks, Inc., 827 N.E.2d 582, 585 (Ind. Ct. App. 2005). A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id.

II. Oral Contract and the Statute of Frauds

The trial court concluded that an oral contract existed among Nora, Lewis, and Patenaude to purchase the O'Connor farm and that proof of part performance removed the oral contract from the Statute of Frauds. See Joint App. of Appellants at 636, Conclusions 1 – 4. Old Paths and Lewis contend that this conclusion is in error.

As to the existence of an oral contract, we note that Old Paths and Lewis argue simply that there was no such oral contract. The existence of an oral contract was essentially a credibility determination between Lewis, who contended there was no such contract, and Nora, who contended there was. There is evidence in the record to support the trial court's determination and we give deference to the trial court's determination that credited Nora's testimony over Lewis's.

The Statute of Frauds requires contracts for the sale of real property to be in writing. See Ind. Code § 32-21-1-1(b)(4). Oral contracts for the sale of land, however, are voidable, not void. Fox Dev., Inc. v. England, 837 N.E.2d 161, 166 (Ind. Ct. App. 2005). Oral contracts for the sale of land may be excepted from the Statute of Frauds where there is part performance. Id.

To qualify as a part performance of the oral contract certain circumstances must be present and these circumstances must be founded on, and referable to, the oral agreement. Partial payment alone is not sufficient to constitute partial performance and removal from within the statute of frauds. Circumstances generally held sufficient to invoke the doctrine of part performance as an

exception to the statute of frauds are some combination of the following: payment of the purchase price or a part thereof; possession; and lasting and valuable improvements on the land.

Indiana courts have held fast to “the validity of the rationale behind the statute of frauds,” and have “rather strictly adhered to requiring proof of a combination of [the aforementioned circumstances].” This required proof must be “clear and definite.”

Perkins v. Owens, 721 N.E.2d 289, 292 (Ind. Ct. App. 1999) (citations omitted).

Possession of the land must be unequivocal and in consequence of the contract and pursuant to its conditions. Id. at 292-93. Only “valuable and lasting improvements” that are founded upon the oral contract are sufficient to take the contract out of the Statute of Frauds. Id. at 293.

[T]he improvements made will have small weight unless they are of a kind that would not have been made had there been no oral contract. They must be “referable to the contract,” it is often said. This does not mean that the improvements made must have been referred to in any way in the contract but only that they are such as it would have been improvident to make in the absence of some such contract, so that they are strong circumstantial evidence of its existence. In order to be sufficient, the improvements made must be valuable and permanent in character, and substantial in amount.

Id. (quoting 4 Corbin on Contracts § 18.15, p. 541 (Rev. ed. 1997)).

In Perkins, we held that the trial court’s findings were not sufficient to support its conclusion that oral contracts were enforceable because of part performance. 721 N.E.2d at 294. Owens and Leedy purchased separate lots that adjoined their respective properties from a divided piece of property owned by Stottlemeyer. Perkins later purchased a lot from Stottlemeyer’s piece of property. Owens’s and Leedy’s contracts and deeds did not include a thirty-foot strip of land that Stottlemeyer had retained to provide access to backlots; Perkins’s contract and deed did include the disputed property. Owens and Leedy filed suit against

Perkins and Stottlemeyer, claiming that Owens and Leedy were owners of respective portions of the disputed property by adverse possession and that they each had an oral agreement with Stottlemeyer that a portion of the disputed property would be given to them after Stottlemeyer sold all of the lots. The trial court found that Owens landscaped the disputed property, maintained it for fifteen years, and built a utility barn on it. The trial court also found that Leedy used the disputed property for a garden and firewood storage, and had bulldozed and landscaped it. The trial court therefore concluded that the cause of action was not barred by the statute of frauds because of part performance. On appeal, we noted that payment of the purchase price or part thereof was not disputed; however, payment alone is insufficient to remove a case from the statute of frauds. *Id.* at 292. We also noted that Owens and Leedy had used and maintained the disputed property prior to entering into either the written contract for the purchase of their lots or the oral contract for the disputed property. To the extent that Owens and Leedy had possessed the disputed property, their possession was the same after entry into an oral contract with Stottlemeyer as it was prior, and it was therefore not in consequence of the contract. *Id.* at 293 (“It is well-settled that ‘a mere remaining in possession under the terms of a parol contract of purchase of land is not sufficient to take the contract out of the statute of frauds.’” (quoting Waymire v. Waymire, 141 Ind. 164, 40 N.E. 523, 524 (1895))). We finally noted that the utility barn and landscaping that were neither permanent in character nor substantial in amount did not constitute “valuable and lasting improvements” upon the disputed property.

In Marathon Oil Co. v. Collins, 744 N.E.2d 474 (Ind. Ct. App. 2001), Collins wished to purchase from Marathon real estate that had formerly been used as a gas station. Collins

and Marathon's representative agreed on a purchase price of \$55,000, but Marathon preferred to lease the property before selling it. Collins signed an eighteen-month lease requiring him to pay \$700.00 per month in rent, \$1,400.00 as a security deposit, and make certain repairs to the property. Marathon indicated that it would give Collins a five-month rent credit for the repairs, but the written lease waived only the first two months of rent payments. Collins took possession of the property and made the repairs and various other improvements in anticipation of purchasing the property. After Marathon contacted Collins about buying the property, Collins was approved for a loan, contingent upon an environmental inspection. Collins conveyed this information to Marathon, and Marathon thereafter never returned Collins's phone calls. Collins was behind in his rent, and Marathon filed a complaint for ejectment. The oral agreement for Collins to purchase the property and for Marathon to give him a reduction in the purchase price for making the required repairs was at issue. The trial court entered a judgment for Collins in an amount in excess of \$75,000 and for Marathon in the amount of \$1,800. On appeal, Marathon contended that the written lease encompassed the entire agreement of the parties and that the award of damages to Collins was improper. Noting that the trial court found that Collins executed the lease and occupied the premises with the understanding that he would be purchasing the property, and that he made nearly \$18,000 in repairs and improvements in anticipation of purchasing the property, we held that the evidence supported the trial court's findings and its conclusion that part performance excepted the oral contract from the Statute of Frauds. Id. at 479-80. Collins testified that he would not have entered into the lease if not for the oral agreement to sell him the property eventually. He also testified that he would not have made the repairs and improvements if he

had not expected to purchase the property. The evidence also showed that he went above and beyond the repairs required by the lease by installing carpet, windows, doors, and signage that constituted valuable and lasting improvements to the property. In contrast to the facts of Perkins, Collins did not possess the property and make substantial improvements until after the oral agreement regarding the purchase was reached. Id. at 480.

In our earlier opinion in this case, we affirmed the trial court’s denial of Old Paths’ motion for partial summary judgment because in addition to evidence that Nora paid \$25,000 toward the purchase of the land, “there was sufficient evidence of possession and ‘valuable and lasting’ improvements for the trial court to conclude there was a genuine issue of material fact that Nora’s actions constituted part performance of the oral agreement between Lewis, [Nora], and Patenaude” Old Paths Baptist Church v. Young, No. 88A05-0107-CV-289, slip op. at 10. Following the trial of this cause, the trial court made the following relevant findings and conclusions:

The Disputed Land was used by [Nora] as her personal residence. . . . Lewis not only accepted [Nora’s] possession of the Disputed Land, he actually marked off the boundary lines. Lewis used his position as pastor in an attempt to take the Disputed Land from [Nora] after she had contributed money for the purchase, possessed the Disputed Land, and made substantial, valuable and lasting improvements thereto. All improvements made by [Nora] to the Disputed Land were “referable to the contract,” valuable, permanent in character, and substantial in amount. [Nora] made improvements to the Disputed Land based upon her belief that she personally owned and controlled the Disputed Land pursuant to the terms of the oral agreement with Lewis.

* * *

CONCLUSIONS OF LAW

* * *

3. Part performance has been demonstrated by the following:
 - a. Payment of a portion of the purchase price by [Nora], Lewis and Patenaude.

- b. Entering upon the land by [Nora] and making substantial and valuable improvements.
- c. By taking possession of the land and exercising Ownership and control over the land as though it was owned by the person in possession.
- d. Maintaining possession to the exclusion of others.
- e. Numerous other facts found by the Court.

Joint App. at 632, 636-37.

The evidence supports the trial court's findings. Nora testified that she would not have contributed money toward the purchase of the land if not for the oral agreement that she would get a deed in her name eventually: "I did not intend to make [the property] a gift to the church. I did not intend to have it in Old Paths Baptist Church name as a final result." Tr. at 1813. The receipts for the money Nora paid toward the purchase of the land are in Old Paths's name, but there is no dispute that it was in fact Nora's money. Lewis prepared a map indicating property division lines, he drove the property with Nora and others to show them the property lines, and he painted property division lines and markers on the ground and trees. Nora moved onto the portion of the land she believed to be hers with no objection from Old Paths or Lewis, and although Old Paths met as a congregation on the property, it did so only with Nora's permission. Nora began building a home on the property and even though some of the materials and much of the labor for the house were donated, Nora contributed roughly \$16,000 of her own money toward the building of the house. Unlike the improvements in Perkins, Nora's house was a permanent and substantial addition to the property. Like the tenant in Marathon, Nora did not possess the land and begin making improvements until after the oral agreement regarding the division of the property was

reached. Her possession and the improvements were made in consequence of the oral contract.

Therefore, we cannot say that the trial court's findings and conclusions regarding possession or valuable and lasting improvements were clearly erroneous. Given these findings and conclusions, we cannot say that the trial court's judgment that the Statute of Frauds did not govern this case because of part performance was clearly erroneous.

III. Equitable Relief

Old Paths and Lewis also contend that the trial court erred in ordering specific performance without considering the doctrine of unclean hands.

Specific performance is a matter of course in contracts involving the purchase of real estate because each piece of real estate is considered unique, without an identical counterpart anywhere else in the world. Wagner v. Estate of Fox, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999). Specific performance is not available as a matter of right, however; it rests within the sound discretion of the trial court subject to the well-settled rules of equity. Id.

One of those rules of equity is that "he who comes into equity must come with clean hands." Wedgewood Cmty. Ass'n, Inc. v. Nash, 781 N.E.2d 1172, 1178 (Ind. Ct. App. 2003), trans. denied. For the doctrine of unclean hands to apply, the misconduct must be intentional and the alleged wrong must have an "immediate and necessary relation to the matter being litigated." Fairway Developers, Inc. v. Marcum, 832 N.E.2d 581, 584 (Ind. Ct. App. 2005), trans. denied. The purpose of the unclean hands doctrine is to prevent a party from reaping benefits from misconduct. Id. The doctrine of unclean hands is not favored

and must be applied with reluctance and scrutiny. Shriner v. Sheehan, 773 N.E.2d 833, 847-48 (Ind. Ct. App. 2002), trans. denied.

First, we note that although the trial court did not make any specific findings with regard to Nora and the doctrine of unclean hands, it does not follow that the trial court “nowhere considered whether or not she was guilty of unclean hands.” Appellant’s Brief of Old Paths at 22. It can be inferred from the fact that the trial court ordered specific performance that the trial court considered all aspects relevant to the appropriateness of that equitable remedy. Substantively, Old Paths and Lewis contend that Nora’s solicitations of funds and materials on behalf of Faith Ranch constitute misconduct that makes an equitable remedy inappropriate. We disagree that Nora’s requests for donations necessarily constitute misconduct. There is no evidence that when Nora solicited donations she had any intent other than to build a home in which she would live and minister to the children in Faith Ranch’s care. Nora testified that she had not wanted to include a “prayer needs list” for the house in her newsletter because she “did not want to mix [personal] stuff with church stuff,” tr. at 1580, but included the list at Lewis’s direction and urging. When Nora resigned from Faith Ranch, she offered to pay everyone who had contributed labor or materials, but everyone refused. See tr. at 3736. Moreover, for unclean hands to bar an equitable remedy, the misconduct must relate to the matter being litigated. Marcum, 832 N.E.2d at 584. The matter being litigated here is the division of property. The particulars of how a building was constructed thereon – especially when it is undisputed that Nora expended sweat equity and a substantial sum of her own money to build the home – are not relevant to the existence and

terms of an oral contract for the purchase and division of the property. We cannot say the trial court abused its discretion in ordering specific performance of the contract.⁷

IV. Findings of Fact

Old Paths and Lewis contend that certain findings of fact by the trial court are improper. Specifically, they contest Findings 68, 70, and 71. Finding 68 is a legal description of “the land the parties agreed would be [Nora’s] part of the 52 acres” and on which Nora relied “prior to building the house on this land.” Joint App. at 623-24. Finding 70 is a legal description of the “part of the 52 acres that Robert Patenaude was to receive for his part of the purchase price[,] . . . a triangular-shaped piece of property in the northeast corner” Id. at 625. Finding 71 is a legal description of the “portion of the 52 acres Lewis was to receive[:] all of that part of the 52 acre tract that [Nora] and Patenaude did not receive.” Id. at 625-26. Old Paths and Lewis claim these findings “cannot be true” because the legal descriptions were never entered into evidence. Appellant’s Brief of Old Paths at 26.

Although neither the legal description of the entire parcel nor the proposed legal descriptions of the individual parcels were introduced into evidence by any party at the trial, the parties admitted into evidence maps and photographs of the property and elicited testimony at length about the property line divisions. There was testimony regarding the lines drawn on the maps, the natural landmarks of and physical markers made on the property

⁷ Old Paths notes that according to the trial court’s findings, Lewis and Patenaude could have unclean hands and should not have been awarded the real estate designated to them. See Appellant’s Brief of Old Paths at 24. Our supreme court has held that “a court of equity has the power to require that to be done which should have been done.” Walter v. Balogh, 619 N.E.2d 566, 568 (Ind. 1993). In fashioning an equitable remedy, the trial court has discretion to craft a remedy that is complete and fair to all parties involved. Roberts v. ALCOA, Inc., 811 N.E.2d 466, 473 (Ind. Ct. App. 2004). Here, the trial court’s remedy enforces the terms of the oral contract the court found to exist. If Lewis and Patenaude have no personal interest in

itself to designate property lines, and the descriptions Lewis made when showing people around the property. Moreover, the trial court walked the property with the parties during the trial. That there was no complete survey of the entire fifty-two acres to help establish the property lines was due in part to Lewis's interference with the surveyors.

The trial court concluded that Nora was entitled to specific performance of the oral contract and that it would invoke its equity jurisdiction to reform the deed from O'Connor to Old Paths to give the parties deeds to the individual parcels that they purchased. See id. at 639. In a reformation action, it is the intent of the parties that controls. Meyer v. Marine Builders, Inc., 797 N.E.2d 760, 772 (Ind. Ct. App. 2003). There was sufficient evidence of the parties' intent with respect to property lines for the trial court to reform the deed to reflect that intention. Notably, Old Paths and Lewis do not argue that the legal descriptions in the trial court's Findings 68, 70, and 71 are wrong. As the parties appealing a negative judgment, they must demonstrate that the trial court's judgment is contrary to law. Infinity Prods., Inc. v. Quandt, 810 N.E.2d 1028, 1032 (Ind. 2004).

A judgment is contrary to law only if the evidence in the record, along with all reasonable inferences, is without conflict and leads unerringly to a conclusion opposite that reached by the trial court. In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences.

Id. Old Paths and Lewis have failed to demonstrate that the trial court findings and judgment thereon are contrary to law.

V. Constructive Trust

owning the property in their individual names and intend for the property to be owned by Old Paths, they are free to transfer the property.

Old Paths contends that the trial court erred in imposing a constructive trust in

Conclusion of Law 19:

A constructive trust is imposed upon Lewis and Old Paths over the lands purchased from June O'Connor described [in] a certain Deed dated May 4, 1998 . . . , which constructive trust is in favor of [Nora].

Joint App. at 639.

A constructive trust is a creature of equity, devised to do justice by making equitable remedies available against one who through fraud or other wrongful means acquires property of another. Kalwitz v. Estate of Kalwitz, 822 N.E.2d 274, 280 (Ind. Ct. App. 2005), trans. denied. Discussing the law on constructive trusts, our supreme court stated:

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another's property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

Melloh v. Gladis, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974) (quoting 5 SCOTT ON TRUSTS § 404.2). The law presumes constructive fraud once it is clear that a fiduciary or confidential relationship existed between two parties, and the dominant party gains an advantage through a transaction involving the weaker party. Morfin v. Estate of Martinez, 831 N.E.2d 791, 803 (Ind. Ct. App. 2005).

Here, a confidential or fiduciary relationship between Nora and Lewis with Lewis as the dominant party was established. A confidential or fiduciary relationship exists when "confidence is reposed by one party in another with resulting superiority and influence

exercised by the other.” Drudge v. Brandt, 698 N.E.2d 1245, 1250 (Ind. Ct. App. 1998). The question of whether a confidential relationship exists is a question for the finder of fact. Dawson v. Hummer, 649 N.E.2d 653, 661 (Ind. Ct. App. 1995). We will reverse a finding regarding a confidential relationship only when there is no evidence to support it or we have a definite and firm conviction that a mistake has been made. Morfin, 831 N.E.2d at 802. Without venturing into the religious doctrines of the church, we note that the evidence clearly establishes that Lewis was the dominant party in his relationship with Nora. Moreover, for at least part of the relevant time period, Lewis held a power of attorney for Nora. Lewis clearly gained an advantage when, at his behest, the entire fifty-two acre property was put in the name of the church that he pastored.⁸ There is evidence that Lewis made material representations to Nora regarding what she would receive in return for payment of part of the purchase price for the entire parcel, that Nora relied on the misrepresentations, and that she was harmed thereby. There being sufficient evidence of constructive fraud, the trial court did not err in imposing a constructive trust upon the land to protect Nora’s property interest until such time as the individual deeds are made and delivered.

VI. Due Process

Lewis contends that he was denied due process by the trial court’s handling of the counterclaim against him. On August 12, 1999, the defendants filed an answer including a counterclaim by Nora against Lewis. On January 19, 2000, Nora filed an amended counterclaim, which referenced her original counterclaim as Count I, and added Counts II

⁸ Old Paths notes that Lewis is not the title holder to the land. Again, without venturing into church doctrine, it is clear from the evidence that Old Paths and Lewis are indistinguishable for the purpose of the constructive trust.

and III. On January 11, 2001, Nora filed a second amended counterclaim, which referenced counterclaim Counts I through III, and added Counts IV and V. At the beginning of the trial in this cause, Lewis alleged that he was never served with Counts I, IV, and V. The trial court engaged in a lengthy discussion with Lewis and counsel for the other parties and determined that Lewis had notice and was aware of the substance of the counterclaims even if there was a defect in service of those claims upon him. Lewis received a copy of the counts in open court and the trial proceeded.

Lewis now alleges that he was denied due process because he “was not notified properly of the operative facts of the allegations against him, and was not given the opportunity to properly prepare to defend after he objected to being tried because he was not served.” Appellant’s Brief of Lewis at 33. He concedes that he did not ask for a continuance of the trial, but argues the trial court should have granted him one. See id. at 32.

“Due process requires that the defendant be given adequate notice of the suit and be subject to the personal jurisdiction of the court.” Stidham v. Whelchel, 698 N.E.2d 1152, 1154 (Ind. 1998) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)). If service of process is inadequate, a court does not obtain personal jurisdiction over a defendant. King v. United Leasing, Inc., 765 N.E.2d 1287, 1289 (Ind. Ct. App. 2002).

Lewis acknowledges that he was properly served with the Amended Counterclaim, which included Count I by reference to the earlier Answer and Counterclaim and added Counts II and III. Lewis filed an answer to the Amended Counterclaim and did not allege lack of jurisdiction therein. “A defendant can waive the lack of personal jurisdiction and

submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction.” Hill v. Ramey, 744 N.E.2d 509, 512 n.7 (Ind. Ct. App. 2001).

As for notice of the claims against him, Lewis acknowledged he was present at depositions at which the substance of the claims was discussed, including his own deposition. He was acting as his own counsel and had and took advantage of access to the court file throughout the proceedings. It is apparent that even if Lewis was not served with actual copies of Counts I, IV, and V of Nora’s Counterclaim, Lewis knew that such counts had been filed in advance of the trial. Moreover, Lewis acknowledges that he did not ask for a continuance of the trial upon being served copies of the Counterclaims immediately prior to the start of evidence in this case. Failure to request a continuance results in waiver of an issue on appeal when the issue is based upon a party’s surprise or lack of notice. Kirtley v. McClelland, 562 N.E.2d 27, 32 (Ind. Ct. App. 1990), trans. denied. Even if, as Lewis contends, the trial court should have granted him a continuance *sua sponte*, Lewis cannot prove reversible error. Indiana adheres to the rule requiring a showing of prejudice before reversal may be granted. Neese v. Kelley, 705 N.E.2d 1047, 1050 (Ind. Ct. App. 1999); see also Ind. Trial Rule 61 (“[N]o error or defect in any ruling or order in anything done or omitted by the court . . . is ground . . . for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice.”). The complaining party has the burden of showing actual prejudice. Neese, 705 N.E.2d at 1050. The trial of this cause was held on twenty days over the course of a year. In that year, Lewis had ample time to apprise himself of the allegations of the counterclaims and prepare to meet them.

VII. Attorney’s Fees

Lewis also contends that the trial court's findings that Nora was entitled to attorney's fees are erroneous. The trial court found that Lewis had acted in bad faith pursuant to Indiana Code section 34-52-1-1 and had committed offenses against Nora's property pursuant to Indiana Code section 34-24-3-1, including trespass, conversion, attempted theft, theft, fraud, and deception. See Joint App. at 630-31.

Lewis contends only that we should review the trial court's conclusion *de novo* and argues that he did not act in bad faith or commit any crimes. The party requesting attorney's fees has the burden of proof at trial. Chrysler Motor Corp. v. Reshete, 637 N.E.2d 837, 838 (Ind. Ct. App. 1994), trans. denied. Lewis, who was defending the attorney's fee claim, is appealing from an adverse judgment and must show that the judgment was clearly erroneous. See Garling v. Ind. Dep't of Natural Resources, 766 N.E.2d 409, 411 (Ind. Ct. App. 2002) (opinion on reh'g), trans. denied. "When the trial court enters findings in favor of the party bearing the burden of proof, the findings are clearly erroneous if they are not supported by substantial evidence of probative value." McCarty v. Walsko, 857 N.E.2d 439, 443 (Ind. Ct. App. 2006). We will reverse a judgment even where there is substantial supporting evidence if we are left with a definite and firm conviction a mistake has been made. Id.

There is substantial evidence of probative value supporting the trial court's findings in favor of awarding Nora attorney's fees. Lewis failed to follow through on the oral agreement between the parties to provide Nora with a deed to her property. By failing to do so, he prevented her from selling the land she had rightfully purchased. There is substantial evidence that Lewis did not deal fairly with Nora throughout their relationship. Based upon

our review of the record of this cause, neither the trial court's findings nor its conclusion that Nora is entitled to attorney's fees is clearly erroneous.

Conclusion

The trial court properly determined that there was an oral contract for the purchase of land and that part performance of the contract removed it from the requirements of the Statute of Frauds. Evidence adduced at trial supported the trial court's order of specific performance and imposition of a constructive trust. The trial court's findings regarding the legal descriptions of the three parcels of land were supported by the evidence. Lewis was not deprived of due process in the service of Nora's counterclaims against him, and the trial court's conclusion that Lewis should pay Nora's attorney's fees was not clearly erroneous. The judgment of the trial court is, therefore, affirmed.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.